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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN WATERHOUSE, ERNEST HAY WODEHOUSE, WALTER FRANCIS FREAR, AND JOHN EDWARD RUSSELL, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF SAMUEL M. DAMON, DECEASED

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 6, 1943, affirming judgments of the District Court of the United States for the Territory of Hawaii in eminent domain proceedings.

## OPINIONS BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 457–464) is reported in 132 F. 2d 699.

## JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1943 (R. 464). Petition for rehearing was denied March 2, 1943 (R. 464). On May 28, 1943, Mr. Justice Douglas extended the time for filing a petition for certiorari for a period of sixty days from June 1, 1943 (R. 465). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether, in determining the value of agricultural land claimed to be adaptable for subdivision purposes, the jury may consider testimony that the present value of the land is a figure arrived at by capitalizing the net income which, in the opinion of the witnesses, would be produced if the lands were subdivided and leased for dwellings, business places, and truck gardens.

2. Whether just compensation includes increases in the value of lands condemned, resulting from authorization of the project for which they are taken.

3. Whether just compensation for lands condemned may include the increment the owner might realize by withholding from sale other competitive lands.

STATEMENT

Commencing in 1939 the United States expanded its military installations at Pearl Harbor Navy Yard and Hickam Field. Between April 26, 1939, and September 9, 1940, Congress appropriated some $30,000,000.00 for specific projects at this military base.[1] During this same period consideration was given to the housing requirements of Army and Navy personnel and national defense workers, particular attention being given to the problem in Hawaii.[2] For the purpose of providing such housing the Act of May 25, 1939, 53 Stat. 757, 774, included an appropriation of $165,000.00 for acquisition of the necessary site. The hearings on this item show that the tract to be acquired was approximately 350 acres of sugar-cane lands, contiguous to Pearl Harbor and Hickam Field, owned by the Damon Estate. Hearings on

[1] See Act of April 26, 1939, 53 Stat. 592, 607; Act of May 25, 1939, 53 Stat. 757; Act of August 9, 1939, 53 Stat. 1301, 1322; Act of June 11, 1940, 54 Stat. 265, 281, 294; Act of June 13, 1940, 54 Stat. 350, 361; Act of September 9, 1940, 54 Stat. 872, 877, 880.

[2] Act of May 25, 1939, 53 Stat. 757, 774; Act of June 2, 1939, 53 Stat. 798; Act of June 28, 1940, 54 Stat. 676, 681; Act of September 9, 1940, 54 Stat. 872, 883; Lanham Act of October 14, 1940, 54 Stat. 1125; see 84 Cong. Rec. pt. 6, p. 5808 (1939); S. Rep. 390, 76th Cong., 1st sess. (1939); H. Rep. 192, 76th Cong., 1st sess. (1939); H. Rep. 2706, 76th Cong., 3d sess. (1940).

Navy Department Appropriation Bill for 1940, H. Subcommittee on Appropriations, 76th Cong., 1st sess. (1939) p. 416.

Accordingly, in November 1940, the United States instituted two condemnation proceedings, accompanied by declarations of taking, to acquire this land, one suit (No. 436 in the district court) embracing 254.468 acres for the Navy Department (R. 42), and the other (No. 434 in the district court) 77.288 acres for army housing (R. 11). The Government deposited estimated compensation totalling $157,369.94 for the land and improvements (R. 17, 59).[2] Inasmuch as the lands involved in the two suits are contiguous and both owned by the Damon Estate, the proceedings were consolidated for trial (R. 103, 105). The cases were tried before a jury which returned verdicts totalling $265,404.80 (R. 440–441). The disputed questions here raised relate to the method by which respondents were permitted to prove value. The valuation evidence may be sumarized as follows:

With the exception of a two-acre parking lot (R. 322–325), all of the lands condemned were, at the time of taking, used for growing sugar cane (R. 116). The owners, the trustees of the Damon Estate, had leased a total of 1,451.66 acres, including the 331 acres here involved, to the Honolulu

[2] Of the amount deposited, $15,639.90 was allocated to growing crops and improvements claimed by the lessee, the Honolulu Plantation Company (R. 59). The value of these items is not here involved (R. 103).

Plantation Company for a term of 15 years from January 1, 1929, at an average annual rental of $23.50 an acre for the sugar cane land (R. 311–313). Experts for the Government stated that the best use of most of the lands was for the growing of sugar cane but that certain highway frontage had some additional value for residential or business purposes. These witnesses valued the lands at a total of $137,487.00, based upon a selling price per square foot (R. 117–125, 134–140).

Respondents took the view that all of the lands had outgrown the category of cane lands and were best suited for subdivisions into residence lots and truck farms (R. 154–155). Based upon this theory, respondents' four experts reached values ranging from $309,279.78 to $514,345.17 (R. 160, 167, 169, 206, 209, 240, 243, 246–247, 321, 325, 330). Castro, the first witness, assumed subdivision of the land into lots which could be leased for dwellings, business places and truck gardens. He then determined the average yearly net rental[4] which he estimated could be obtained from such a subdivision and capitalized such rentals at four percent. The result he called fair market value at the date of taking. (R. 158–169.) Respondents' next two valuation witnesses, Harrison and Kearns, who collaborated on their appraisals (R. 260), followed a similar method of determining value as to

[4] This "net" rental assumed that the lessee would pay all taxes, improvement assessments, water rates, and similar charges (R. 194).

at least some of the land involved (R. 206–218, 221–224, 240–248, 260–265). They capitalized their prospective rentals at five percent (R. 210–213, 262).

The last witness as to value was respondent Russell, who was chosen to represent the other trustees (R. 340). He envisaged subdivision of the entire area into lots which could be leased for residence and business purposes. He capitalized at four percent the estimated income from such leases after deduction of expenses. (R. 314–321, 325–326, 330.)

All of these opinions were based upon the belief that a demand for residence and truck farms existed and would continue in the future (R. 169, 181–182, 205, 206, 207, 227, 239, 242–243, 248–249, 285–287, 317, 320, 345–346, 353). To support this view Russell and Sam R. Damon, a beneficiary of the Damon Estate (R. 282), testified that they had a plan for development of their holdings in the vicinity (R. 287–290, 314–318), a portion of the lands here condemned being fifth or sixth in the order of development (R. 317–318). However, the schedule was revised because of the "tremendous amount of development work going on at Hickan and Pearl Harbor" so as to advance the time the condemned lands would be developed (R. 318). All of the witnesses believed that the lands could be successfully subdivided largely because of the demand created by Army and Navy personnel and defense workers (R. 177–

178, 181–182, 205, 239–240, 285–291, 320, 326). The estimates of income upon which the capitalizations were based assumed that the subdivision would be accomplished five or six years in the future, i. e., 1945 or 1946 (R. 218–219, 248–249, 353). The witnesses assumed not merely a continuance to 1946 of the defense housing demand but in fact based their valuations on the assumption that the demand "was going to accelerate very rapidly" (R. 345). Most of respondent's witnesses further assumed that there would be no competition from other lands owned by the Damon Estate in the vicinity (R. 225–227, 253–254, 351–353). And Russell admitted that the rentals he capitalized could only be obtained by withholding those other lands from the market (R. 342).

The Government resisted admission of respondents' scheme of valuation by direct objections (R. 159, 161, 208), by motions to strike the testimony (R. 167–168, 194, 197, 219, 262, 314–315, 418–419), by requested charges (R. 90–91), and by motions for directed verdicts (R. 31, 71, 419). All of these objections were overruled. Some nine hours after the jury retired the instructions concerning potential uses were repeated at the request of one of the jurors (R. 434–438). The verdicts were returned the next day (R. 440) and judgments were thereafter entered (R. 33–35, 75).

The circuit court of appeals affirmed in an opinion announced January 6, 1943. The Government

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petitioned for rehearing, calling attention to the intervening decision of this Court in *United States* v. *Miller*, 317 U. S. 369. On February 6, 1943, an order was entered stating that the opinion had been written without consideration of the *Miller* decision and inviting a supplemental memorandum on the applicability of that case. Such memorandum was filed, but the petition for rehearing was subsequently denied (R. 464).

**REASONS FOR GRANTING THE WRIT**

1. The Government contended in the courts below that valuations based solely on capitalization of income which the witnesses estimated might be obtained from leases after subdivision of the sugar cane lands into lots and truck farms were not admissible. The circuit court of appeals recognized that many assumptions are involved in this method of valuation, such as the rental to be earned, expenses to be deducted therefrom, and the rate of interest at which to capitalize (R. 462).[5] Nevertheless, the court concluded that "capitalization of rental value is evidence of the market value of the land" even when calculated on the basis of

[5] The speculation involved in the choice of interest rate is emphasized in Schmutz, *Condemnation Appraiser's Handbook* (1938), p. 149, where it is pointed out that capitalization based on a 5% rather than a 6% rate results in a 20% higher valuation. Respondents' witness Henderson, who testified to an interest rate of 3% to 4%, admitted that he was not qualified to advise on real estate (R. 237). See also R. 307–308.

prospective rentals from a nonexistent subdivision (R. 462).

Thus, there is presented the very question which this Court found it unnecessary to pass upon in *United States ex rel. T. V. A.* v. *Powelson,* No. 3, 1942 Term, namely, whether value may be determined by capitalizing hypothetical profits from an imaginary project upon the property taken. See advance sheets, p. 14. The cases cited by the court below (R. 462) merely stand for the proposition that the capitalization of rentals accruing from *existing* leases is some evidence of market value. All of the decisions of both the federal and state courts exclude capitalization of estimated rent or income from *prospective* enterprises because too speculative or conjectural. *United States* v. *Meyer,* 113 F. 2d 387, 397 (C. C. A. 7), certiorari denied, 311 U. S. 706; *United States* v. *Davis,* 41 F. Supp.595 (E. D. Tenn.); *East Bay Municipal Utility Dist.* v. *Lodi,* 120 Cal. App. 740, 760–761, 8 P. 2d 532; and cases cited by this Court in footnote 14 of the *Powelson* decision. The only reason advanced by the court below to justify such evidence was the witnesses' assertion that a willing buyer would indulge in such speculations (R. 462). It is true that an expert, in arriving at his opinion of market value, may consider numerous items, such as offers, remote sales, and tax assessments, which would not be admissible if offered as direct evidence of value.

But when, as here, his valuation is based solely on nonadmissible items, his opinion of value is likewise inadmissible. *Atlantic Coast Line R. Co.* v. *United States,* 132 F. 2d 959, 963 (C. C. A. 5); see Orgel, *Valuation under Eminent Domain* (1936), sec. 131, pp. 446–448.

Moreover, even apart from the capitalization of hypothetical profits, respondents' valuations were not admissible because they were based, not on the value of the property as a whole, but on the aggregate rental or sale price of the individual lots and truck farms into which the experts assumed the sugar cane land could be subdivided. Here again the courts which have passed upon the question are agreed that evidence as to the price unimproved land would sell for if subdivided or as to the rents which might be derived from the land if improved is not admissible. *Pennsylvania S. V. R. Co.* v. *Cleary,* 125 Pa. 442, 451, 17 Atl. 468; *Kansas City and Topeka R. Co.* v. *Splitlog,* 45 Kan. 68, 72, 25 Pac. 202; *Burt* v. *Wigglesworth,* 117 Mass. 302, 306; *Greenfield* v. *Philadelphia,* 282 Pa. 344, 354, 127 Atl. 768; *Blackwell's Island Bridge,* 118 App. Div. 272, 274–275, 103 N. Y. Supp. 441; *Monongahela W. P. Pub. Serv. Co.* v. *Monongahela Develop. Co.,* 101 W. Va. 165, 132 S. E. 380. The conjectural nature of respondents' assumption is apparent from the fact that their witnesses agreed that the successful completion of the subdivision could not

be accomplished before 1945 or 1946 (R. 218–219, 248–249, 346).[6]

Whether such speculative evidence is to be admitted in condemnation cases is a question of considerable importance to the Government, which at the present time is engaged in condemning some 8,000,000 acres of land for national defense and other purposes. The Government is repeatedly confronted with attempts of private landowners to inject into the valuation proceedings grandiose plans for the development of unimproved property, the value to be determined by the capitalization of prospective profits or by the estimated prices of individual lots in a hypothetical subdivision.

2. Furthermore, the use of the capitalization method in this case has compelled the United States to pay enhancement of value occurring after the Government was committed to the project, contrary to this Court's decision in *United States* v. *Miller*, 317 U. S. 369.

One of the important projects in connection with the national defense program was the expansion of the naval and military base at Pearl Harbor and

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[6] "The trial court cannot be too careful in excluding evidence of this character, as witnesses can always be found who will, in their imagination, cover the most hopelessly unmarketable vacant land in the neighborhood of a large city with apartment houses filled with desirable tenants, and, with the aid of a little figuring, capitalize the prospective net income at ten times the actual value of the land." 2 Nichols, *Eminent Domain* (2d ed. 1917), sec. 445, p. 1171.

Hickam Field. An essential element thereof was the securing of housing for military and civilian personnel. Other negotiations having failed, an appropriation and authority for acquisition were granted by Congress in May 1939. From the hearings upon the appropriation, there can be no doubt that the specific lands here involved were the lands to be acquired. (See Appendix, *infra*, p. 15.)

Nor can there be any doubt that respondents' witnesses largely based their estimates upon the increased demand resulting from the expansion program undertaken by Congress in 1939 (R. 205, 239–240, 285–291, 287, 315, 320, 326). In fact, it was this demand which led respondents to advance the date when they proposed to develop these lands (R. 318). And the witnesses did not stop with the date of taking, November 1940. They assumed that the subdivision would be accomplished five or six years in the future, i. e., 1945 or 1946 (R. 218–219, 248–249, 346) and that the greatly increased demand due to national defense workers would not only continue to 1946 but that "it was going to accelerate very rapidly" (R. 345; see also R. 263–264, 270).[1] Thus, the valuation by

[1] The witnesses were compelled to assume such continuance of the demand in order to make their hypothetical subdivision successful. Castro testified that if the land was available in November 1940, "at least one-third of it would be absorbed for homes" (R. 169). And Russell stated (R. 353) that "Some of those lots would be years off before they would be put on the market at all."

capitalization of future earnings has permitted respondents to include enhancement of value which they thought would occur even after the Government condemned the lands. "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." *United States* v. *Miller*, 317 U. S. 369, 377.

3. Respondents' valuations were also based on the assumption that there would be no competition from other lands owned by the Damon estate. The lack of competition was an essential part of respondents' valuations, and the witnesses refused to estimate to what extent competition would reduce their estimates (R. 254–255, 351–353). As Kearns expressed it (R. 254), "We had in mind that it had a greater value to the present owners than to anyone else." The Government's objections to valuations based on such an assumption were overruled and its request for a charge that the jury should assume that neighboring lands would be in competition with the lands condemned was denied (R. 85). Instead, a charge was given permitting the jury to base its verdicts on the assumption that the other lands would be withheld from competition.[8]

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[8] The court charged the jury that, "you are not bound to assume that the Trustees of the Damon Estate would not release any of the lands in the immediate vicinity from their present status" (R. 428). As thus phrased, the charge did not prohibit the jury from returning an award based in part upon the Damon estate's monopoly of land in that area.

In *United States* v. *Miller*, 317 U. S. 369, 375, this Court emphasized the fact that elements of value relating to special adaptability of the land to the use of the owner must be disregarded. Since it is obvious that a willing buyer would not pay an increased value on the assumption that respondents would withhold their other lands from competition, there is no reason why the Government in a condemnation proceeding should be required to pay monopoly prices.

## CONCLUSION

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

CHARLES FAHY,
*Solicitor General.*

JULY 1943.

# APPENDIX

**Comparison of testimony of Rear Admiral Ben Moreell, Chief of Bureau of Yards and Docks on April 5, 1939 before House Subcommittee on Appropriations (page 416 of Hearings) with facts in the record.**

| TESTIMONY | FACTS IN RECORD |
| --- | --- |
| NAVY YARD, PEARL HARBOR, HAWAII | |
| *Purchase of Land* | |
| Mr. FERNANDEZ. The first item is $165,000 for the purchase of land at the Navy Yard, Pearl Harbor, Hawaii. | |
| Admiral MOREELL. This project was authorized by the act of June 25, 1938. | |
| The Pearl Harbor Navy Yard is the principal outlying naval base of the United States and is a most important activity for the repair, upkeep, and support of the United States Fleet in the Pacific. The area of the naval base is limited and there is not sufficient land for the development of housing areas for industrial civilian personnel and enlisted personnel. | |
| The housing situation in the vicinity of Pearl Harbor is acute and efforts have been made through the Federal | Russell testified he knew the Navy was interested in having the Damon Estate erect a series of low-costs to |

Housing Administration to secure low-priced housing for officers, enlisted, and civilian personnel. To date no satisfactory solution has been reached and it appears impracticable to obtain the needed housing by reliance on private parties.

This project contemplates the acquisition of a tract of land adjacent to the navy yard, to be developed as funds become available, for housing of the various classes of personnel attached or assigned to the station. It is proposed that this area be developed to meet the immediate needs to relieve the present acute housing situation, with provision for future expansion in time of emergency.

The area contains about 350 acres.

Mr. FERNANDEZ. Did that authorization contemplate the utilization of this land for civilian employees?

ADMIRAL MOREELL. Yes, sir.

Mr. FERNANDEZ. Has there been an expansion of the civilian personnel there recently?

ADMIRAL MOREELL. Not in the immediate past; no, sir.

Mr. FERNANDEZ. Is there any other land in this immediate vicinity that is suitable for quarters?

relieve the housing shortage at Pearl Harbor (R. 337).

Russell testified the urgent demand for the lot just outside the navy yard gate had been present for a year and a half before November 1940, i. e., about June 1939 (R. 318). He also stated that Army and Navy activities particularly affected the demand for this lot (R. 320).

The lands condemned total 331.756 acres (R. 22, 42).

The land adjoins Pearl Harbor and Hickam Field. See map, Ex. G, original.

ADMIRAL MORRELL. No, sir.

Mr. FERNANDEZ. How do you arrive at the figure of $165,000?

The deposit for land and improvements of $157,369.94 (R. 22, 57) equals about $474 per acre. $165,000 for 350 acres equals about $471 per acre.

Admiral MORRELL. That is a figure estimated by the Commandant. The land belongs to several estates, and I understand that by the terms of the trusteeship they are not allowed to quote a price.

I have here a statement from the Commandant, from which I quote as follows:

It was evident, from negotiations with owners of these parcels, that they were very reluctant to fix definite prices for the parcels in question. The Commandant is of the opinion, however, that the amount of $165,000 is sufficient to cover all of the tracts proposed to be purchased. An area of 244 acres is classed as cane land, 48 acres are classed as pasture land, 72 acres as fishponds and waste lands, and approximately 1½ acres are classed as semicommercial lands. The average price per acre approximates the price awarded in condemnation proceedings for land of high potential value for agriculture.

Russell, one of the trustees of the Damon Estate, testified that in 1939 and 1940 negotiations were had with the Navy Department relating to a housing development (R. 326, 335–337).

That would approximate the price paid by the Army for Hickam Field, or $441 per acre.

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